IN THE HIGH COURT OF JUDICATURE AT BOMBAY.

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 197 OF 2001.

1.Suresh Maruti Badgurav @ Pujari

2.Arjun Balapa Khatam Bali3.

3.Maruti Laxman Badgujav @ Pujari

4.Sannappa Yellappa Pujari

5.Ratnappa Basauami Sanadi @ Halab .... Appellants
(Orig.Accd.Nos.1 to 5)

V/s

The State of Maharashtra ....Respondent.

Mr. Ganesh Gole for Mr. K. S. Patil, Adv. for the appellants.

Mrs. U. V. Kejriwal, APP for the State.

CORAM: V.G. PALSHIKAR
AND
SMT.NISHITA MHATRE, JJ.

19th April, 2005.

Oral Judgment: (**Per Palshikar, J**)

1. Being aggrieved by the order of conviction and sentence passed by the Additional District & Sessions Judge, Gadhinglaj, Kolhapur in Sessions Case No.14 of 2000 on 29.1.2001 the appellants-accused have preferred this appeal on the grounds

mentioned in the memo of appeal and also verbally canvassed before us.

2. With the assistance of the learned counsel for the appellants and the learned Additional Public Prosecutor we have perused the entire evidence and reappreciated the same.

3. The prosecution story as it emerges from our reappreciation of evidence stated briefly is that the appellants and three more accused persons were prosecuted for committing offence punishable under sections 395 and 396 of Indian Penal Code on the allegations that on 10.7.1999 in the night around 1.00 O' clock there was stone throwing on the house of complainant and the house of the victim Shankar Shivappa Patil was broken into by unknown dacoits. They assaulted Shankar with scythe and axe lying in the shed of the house of Shankar and ran away with the loot which consisted of money purse and ornaments of Shankar and certain gold ornaments belonging to mother of Shankar. The matter was reported to the police, police investigated the offence and arrested accused persons who were eight in number and on completion of the investigation charged them for having committed offences under sections 395 and 396 of Indian Penal Code.

4. The prosecution examined as many as 13 witnesses to bring its case that the accused persons were guilty of the offences as mentioned above. This order dated 29.1.2001 is impugned by the appellants-original accused Nos. 1 to 5 on the grounds mentioned in memo of appeal as also orally canvassed before us by learned counsel

appearing on behalf of appellants-accused. Three other accused persons who were tried were acquitted by the learned trial Judge.

5. The learned advocate appearing on behalf of the appellants-accused assailed the order of conviction categorically on the ground of total lack of identification of the accused persons as the assailants or dacoity. He has also assailed the test identification parade as held by the prosecution being wholly illegal without observing any procedure whatever laid down in the Criminal Manual for the purposes of holding such parade. He also assailed the recoveries made at the instance of the accused as there is no cogent evidence of what really was said by the accused who did not know Marathi and what was conveyed by the interpreter P.W. 2 – Ramgonda Patil who also is a witness to the recovery. The test identification parade was held by one Rudrappa Kore, a Government official who is examined as P.W. 11. Learned counsel for appellants relying on division bench judgment of this Court reported in the case of ***Vilas Vasantrao Patil*** V/s ***The State of Maharashtra,*** 1996 Cri. L.J. 1854 submitted that there being total noncompliance of instructions contained in Criminal Manual para 16 the entire evidence of identification is liable to be rejected and if that is so rejected there is nothing on record to connect the accused to the offence. Reliance was also placed on another judgment reported in the case of ***Ramchandra Bhudiram Gupta*** V/s ***State of Maharashtra*** , 1995 Cri. L.J. 4048. These submissions were countered by the learned Additional Public Prosecutor relying on a Judgment of the Supreme Court reported in the case of ***State of Maharashtra*** V/s ***Suresh***, 2000 ALL MR (Cri.) 554 where the Supreme Court has observed that merely because one or two lapses in the procedure

prescribed by identification parade such lapses cannot render the entire procedure unusable. The contention of the learned Additional Public Prosecutor being that the lapses were such as are held condonable by the Supreme Court of India by the aforesaid judgment.

6. We will consider the entire evidence as we have reappreciated it earlier to decide these rival contentions. P. W. 1- Appasaheb Patil is a neighbouring witness. He was called by the police on 10.7.1999 to the house of Balabai Patil where he found that the household articles were scattered, the door was lying in broken condition and there was enough evidence of violence having taken place. Panchnama was prepared and was ascribed by the witness who proved it in the Court.

7. Thereafter the witness went to the house of Shankar Patil who is the victim in this case and noticed the situation then existing in the house of the deceased. A panchnama was made which was also ascribed by this witness and he pointed out in his deposition that they found one sickle lying in the room which was seized by the police. Several other articles were seized, the seizure memo is duly proved by the attesting witness P.W. 1. The witness has also identified these articles in the Court. From the testimony of this witness it is therefore obvious that there was theft in the house of victim Shankar and Balabai and panchnamas recording the spot were duly proved.

8. P. W. 2- Ramgonda Patil is another panch witness who was called to the Tahsil office to act as pancha and also as an interpreter as he knew Kannad language

and could translate this statement in Kannad language to Marathi. He deposes that Sanappa Pujari accused No.4 made a statement before the police in the police station in Kannad language that he has hidden gold articles and money in the house and he would recover the same. The witness translated the statement given in Kannad by accused No.4 in Marathi to the police. He has proved the same as Exh.46 in the Court. He then accompanied the accused along with police to the place indicated by the accused where certain ornaments and money was seized. He has proved the seizure. Thereafter on 10.10.1999 witness was again called as pancha and interrogated by the police. This time to hear and translate the statement to be made by accused Sanappa it is alleged that this accused Sanappa told in Kannad language that he has hidden gold beads in one paper in one field and he would discover the same. The translation was made to the police the accused was taken to the site mentioned where he recovered the gold beads as alleged by the prosecution. The recovered articles were identified by the witness in the Court.

9. P. W. 3 – Sadashiv Patil who is third panch. He is witness to the recovery of certain cash amount from the house of Badgurav i.e. House of accused No.5-Suresh. The recovery is duly proved. Recovered items are duly identified in the Court. Thus the police have proved certain recoveries to have taken place from some of accused persons.

10. Then comes evidence of P.W. 4 – Mahadevi Patil daughter of Shankar who is a victim in this case. She is the person who has lodged the complaint before the

police and she is the sole eye witness to the entire incident. She has deposed that after in the night of 9.7.1999 round 11.00 p.m. she slept along with her father and other relations and in the night at about 1.00 O' clock shouts were heard from the house of Balabai who was shouting and calling father of the witness to help her. Hearing the the shouts the witness as also the victim woke up from the sleep, the victim opened the backside door towards cattle shed, witness was behind the victim when the victim received a stone blow over his thigh. He therefore immediately closed the backside door and returned to the front room of the house. According to the witness at that time some unknown person climbed over the top of the roof and threw tiles of the roof in the house and two such tiles were broken. Two other persons broke open the door by kicks and blows and therefore all present there went to cattle shed according to the witness. She then deposes that two persons came at the door of the cattle shed holding axe and sickle in their hands and demanded gold and money in Kannada language. At that time the victim Shankar was holding a stick in his hands. Witness then states that both persons who came to the door and were armed with axe and sickle ran towards the victim held him and made him sit on the log of wood. The witness then pleaded with these two assailants to hurt the father and take away whatever they want and accordingly her grand mother handed over gold beaded necklace and some silver ornaments to those persons. She has identified those articles in the Court. Then she specifically states that thereafter the two above referred persons viz. who holding sickle and axe assaulted the victim with axe and sickle. She specifically describes them as two unidentified persons. It will be worthwhile to note exact statement of this witness:

> " Thereafter, those unknown persons pushed my father, by scuffling with him towards, the place of giving fodder (Godhane). Those persons inflicted, axe blow and sickle blow, over the body of my father. Those persons means above referred two unknown persons."

Then this witness says:

> " After assaulting my father, the above said unknown persons, left out house, by front door."

Thereafter the villagers from Kumbharwada gathered, matter was taken to the police where she lodged the complaint which is recorded as First Information Report duly proved as Exh.60.

11. The witness then states that on 2.10.1999 she was called at the Tahsil office and the Tahsildar told her that the police have arrested the dacoits and wanted to know whether she could identify them. She accompanied the Tahsildar to a room where 15 persons were standing out of which five persons were accused whom the witness identified by touching their clothes. The process was repeated and the witness again identified these persons. She has reiterated the statement that the persons were 15 in number and included five accused as identified. The witness has been extensively cross examination in relation to the holding of test identification of parade and has

consistently stated that there were always only 15 persons and those 15 persons include the five accused whom she identified.

12. P.W. 5 – Balabai Patil is the other eye witness whose house was robbed. She has very categorically stated that there was stone pelting on her house and when she opened the door the stone pelting on her house continued therefore she closed the door again which was broke open and total five dacoits entered the house, two were near the witness and two dacoits went to the inner room and opened the wooden box cupboard and committed the theft. She has stated what was stolen and some of the articles were recovered. She also says that she called Shankar Anna but the accused told her to keep quiet otherwise they would hit her on the head and then they went to the house of Shankar. According to this witness therefore it was only five persons who entered the house and committed theft. This witness states that two months after the incident she was called to Tahsil office along with P.W. 4 – Mahadevi Patil and was told to identify the accused persons. She also stated that there were five accused persons in the group of 15. She identified all the five and she reiterated the situation in her cross examination also.

13. P.W. 6 – Mallikarjun Athane is the doctor who conducted the post mortem and has proved homicidal death of Shankar. P.W. 7 – Shivubai Patil is yet another eye witness who is sister of Balabai whose house was robbed. She also repeats almost everything that is stated by Balabai. She also mentions number of accused to be five. However this witness was not asked to identify any of the accused persons in the test

identification parade and she has identified one accused in the Court as the person who had put knife on her neck. She also states like Balabai that after accused left they went towards the house of Shankar and after hearing sound of removing tiles and breaking of the door we all hid in the sugarcane crop. P.W. 7 – Shivubai is thus the only witness who has identified one accused directly in the Court. This witness was also summoned to the test identification parade. Witness says that there were 15 persons standing in one row and she also identified those five persons.

14. P.W. 8 – Khanderao Koli is police constable who handed over the body in the custody of the relatives of the victim. P.W. 9 – Umapati Muttuswami is a tailor but he has turned hostile.

15. P.W. 10 – Rama Kumbhar was a person who was present at the time when the matter was reported to the police. His statement is also recorded by the police. His evidence is wholly inconsequential.

16. Then comes the evidence of P.W. 11 – Rudrappa Kore who was in charge of the Tahsil, Gadhinglaj on 2.10.1999. He has deposed that on that day he conducted test identification parade for the accused. He has given detailed description of the manner in which he conducted the parade and has categorically stated that he called persons of the same size and age group as the accused. They were 10 in number and asked the accused to mingle with them, called one after the other witness who had earlier claimed to have seen the accused or some of them. He has deposed that he

has followed the procedure prescribed for holding test identification parade and that the accused persons were rightly identified by the witness. P.W. 12 – Maruti Gundkali is a taxi driver who took 8/9 unknown persons to Hanimbal around 8.00 p.m. On 9.10.1999. The testimony of this witness is therefore wholly inconsequential. P.W. 13 – Ashok Survegandh is the investigating officer. This in all is the evidence on the basis of which the learned trial Judge recorded the order of conviction accepting the identification as done by P.Ws.4, 5 and 7 as adequate for convicting the present appellants and acquitting the three other accused persons. We have to consider from deposition of these witnesses and the identification as done by P.Ws.3, 5 and 7 as to whether this identification is legal, proper and adequate to sustain the order of conviction.

17. How to hold identification parade is laid down in Criminal Manual of the Government of Maharashtra. Para 16 thereof speaks of identification parades and prescribes how the same is to be held. It is provided by this procedure that due precautions should be taken that the accused are not seen by the witnesses prior to the parade or they are not identified to the witnesses prior to the parade. It should be fair and every precaution must be taken to exclude any suspicion of unfairness. It is specified that parade should be arranged by the officer who is not a police officer. Para 16 gives detailed instructions as to how identification parade is to be conducted. It is specifically stipulated that the suspect should be placed amongst persons if practicable eight or more who are as far as possible similar in age, height, general appearance to the suspect and two suspects of roughly of similar appearance should be paraded with atleast 12 other persons. It is then specified that where there are more than two

suspects there should be more parades than one, each including not more than two suspects and the report should accordingly be made. Exhaustive instructions are contained in this para as to how report is to be made and how identification is to be recorded. Relying on this elaborate procedure it is contended by the learned counsel appearing on behalf of the appellants-accused that whole procedure was violated by non observance of requirements of para 16 of Criminal Manual. It provides that as far as possible eight persons per suspect should form the para or group from which the suspect is to be identified. It is specifically provides that at any given point of time the group for identification should not consist of more than two accused and atleast eight or more persons of similar height, weight, appearance etc. The intention of providing such detailed precautions is to avoid engineered identification by the witnesses concerned. It is obviously there on record that in this case identification parade was held, the group consisted of 15 persons, five of whom were the accused. This aspect has been reiterated thrice by all the three witnesses viz. P.Ws. 4, 5 and 7. It has been categorically laid down by this Court in ***Ramchandra's*** case (supra) as under:

> "17. In order to make identification evidence beyond reproach, it is high time that an end is put to the practice of holding of identification at police station and identification parades instead are held in jail. This practice would not only enable the police to wash the srtigma of showing suspects prior to their identification; a stigma which more than often is unfounded, but has manifold other advantages. Jails have a large population these days. It would be easy there to find persons similar to the

suspects sought to be put for identification. Such similar persons have to be mixed with the suspects at the time of identification.

The identification in jail would not only actually be free from any taint or suspicion but equally importantly it would also appear to be so, It would instil a sense of confidence both in the minds of the suspects sought to be put for identification as well as the court. There are some other infirmities too in the evidence of identification, which render it unworthy of acceptance.

Firstly, the procedure of holding the identification as laid down in the Criminal Manual issued by the High Court of Judicature, Appellate Side, Bombay has not been followed. The Manual provides that not more than two suspects at a time should be put for identification in one parade but, in the instant case, three persons viz. The appellants and Medha Jagganath Dhobi were put up together for identification in one parade.

In fact, the Executive Magistrate went to the extent of saying that " I am not aware about the High Court Criminal Manual about the method of holding the parade". This is a shocking state of affairs. We expect that in future, it would be ensured that the Magistrates who conducted identification proceedings are atleast aware of the High Court Criminal Manual which deals with the manner in which they are to be

conducted. We would like to emphasise that little value can be given to the identification held in breach of provisions contained in criminal Manual of this court.

Secondly, in the identification memo, there is no mention of the fact that the dummies mixed with the appellants bore similar physical appearance and hence, we do not think it safe to believe the Magistrate when he deposed to this effect in the trial court. Once the court entertains doubts about dummies bearing similar physical appearance being mixed with the appellants, at the time of their test identification, the court has no option but, to reject the evidence of identification."

From the above it will be very clear that it is mandatory for the prosecution to see that in the identification parade not more than two suspects at a time are put on identification. This aspect is grossly violated in the present case when five accused persons were put in the company of 10 others for identification parade. There has been gross violation therefore of the mandatory requirement of how to hold identification parade.

18. This Court has then held in another division bench judgment in ***Vilas'***s case (supra) that where there is non compliance of the instructions contained in Criminal Manual para 16 the evidence of identification is not acceptable. In the face of these two judgments of this Court it is therefore impossible to accept the identification of the

accused persons at the hands of P.Ws. 4, 5 and 7. This evidence is therefore liable to be rejected. If the evidence is so rejected there is nothing on record which identifies the accused as the persons who committed the offence. Consequently the recoveries also must go because what has been recovered is by persons named in the presence of persons who were told the names and identity of the accused that these very persons were in the identification parade and were identified by the witnesses. The parade itself being illegal recoveries become in consequential and in the result the entire order is vitiated for non compliance of mandatory requirements for holding identification parade. It is therefore a case where the assailants or the dacoits are not identified at all. Even if the homicidal death of Shankar is proved the conviction under section 396 or 395 of any of the accused cannot be justified. In the result the appeal succeeds and is allowed. The impugned order of conviction and sentence is set aside. The appellants-accused are acquitted of the offence with which they were charged. Appellants-accused are liable to be released forthwith if not required otherwise.